

E-Filed 11/20/2007

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MARY HELEN WOODSON,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES,
INC.,

Defendant.

Case Number C 05-3387

ORDER¹ GRANTING DEFENDANT'S
MOTION TO DISMISS IN PART
WITH LEAVE TO AMEND

[re: docket nos. 88, 93, 95]

I. BACKGROUND²

This case involves two separate actions. Action One is based on allegations that IBM improperly removed Plaintiff from her former position on or about June 24, 2002, forcing her to find another position in the company. Plaintiff filed her complaint in case number C 05-337 JF ("Action One") in the Santa Clara Superior Court on May 10, 2005, and filed a first amended

¹ This disposition is not designated for publication and may not be cited.

² The factual background of the consolidated actions is set forth in the Court's order dated December 19, 2006 and will not be repeated here.

1 complaint ("FAC") in that Court on July 8, 2005. The FAC asserted claims for: (1) age
2 discrimination; (2) disability discrimination; (3) religious discrimination; and (4) breach of the
3 covenant of good faith and fair dealing. IBM removed the action to this Court on the basis of
4 diversity of citizenship on August 19, 2005.

5 On November 8, 2005, this Court granted IBM's motion to dismiss for failure to state a
6 claim upon which relief may be granted. Plaintiff's claim for religious discrimination was
7 dismissed without leave to amend because Plaintiff conceded that the claim was time-barred.
8 Plaintiff's claims for age and disability discrimination were dismissed with leave to amend
9 because Plaintiff did not allege any facts demonstrating that her transfer to the new position
10 resulted in a substantial adverse change in the terms and conditions of her employment.
11 Plaintiff's claim for breach of contract was dismissed with leave to amend because Plaintiff did
12 not allege how her transfer within the company breached any of the terms of employment recited
13 in the FAC. Plaintiff's claim for breach of the implied covenant, which asserted that IBM's
14 breach of contract was in bad faith, was dismissed because Plaintiff failed to allege adequately a
15 breach of contract.

16 On December 5, 2005, Plaintiff filed a second amended complaint ("SAC"). The SAC
17 asserted the following claims: (1) age discrimination in violation of California's Fair
18 Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940 *et seq.*; (2) disability
19 discrimination in violation of FEHA; (3) breach of employment contract; and (4) breach of the
20 implied covenant of good faith and fair dealing. On December 22, 2005, IBM moved to dismiss
21 the SAC for failure to state a claim upon which relief may be granted. Plaintiff opposed the
22 motion, and the Court heard oral argument on April 28, 2006. On May 2, 2006, the Court denied
23 IBM's motion to dismiss and ordered it to answer the SAC within twenty days. IBM filed its
24 answer on May 22, 2006.

25 Case number C 05-3939 JF ("Action Two") involves allegations that IBM terminated
26 Plaintiff's employment unlawfully in October 2003. On or about October 10, 2003, and again on
27 or about September 28, 2004, Plaintiff filed an employment discrimination complaint with the
28 California Department of Fair Employment and Housing ("DFEH"). In a right-to-sue letter dated

1 September 28, 2004, the DFEH informed Plaintiff that she had the right to bring a civil action
2 under FEHA within one year. On September 28, 2005, exactly one year later, Plaintiff filed
3 Action Two, naming IBM as a defendant. The complaint asserted claims for (1) disability
4 discrimination, (2) breach of employment contract, and (3) breach of the covenant of good faith
5 and fair dealing. Plaintiff did not serve the complaint until April 26, 2006, 211 days after it was
6 filed.

7 On May 16, 2006, IBM moved to dismiss the complaint in Action Two for untimely
8 service or, alternatively, for a more definite statement of Plaintiff's first two claims for relief.
9 Plaintiff opposed the motion, and the Court heard oral argument on July 21, 2006. On July 25,
10 2006, the Court denied the motion to dismiss but granted the motion for a more definite
11 statement ("July 25th Order"). The Court directed Plaintiff to clarify her statement of
12 jurisdiction, her first claim for disability discrimination, and her second claim for breach of
13 contract. The Court also formally consolidated the two actions under the earlier case number.
14 The Court directed Plaintiff to file any amended complaint before August 25, 2006.

15 On September 22, 2006, Plaintiff filed an administrative motion for extension of time to
16 file an amended complaint, attaching her proposed pleading. On October 2, 2006, the Court
17 granted this motion and accepted the proposed amended complaint. This pleading of the First
18 Amended Complaint After Consolidation (FACC) asserts three claims for relief: (1) disability
19 discrimination; (2) breach of employment contract; (3) breach of the covenant of good faith and
20 fair dealing.

21 On October 19, 2006, IBM moved to dismiss the FACC for failure to state a claim upon
22 which relief may be granted ("motion"), pursuant to Federal Rule of Civil Procedure 12(b)(6), or,
23 alternatively, for a more definite statement. On December 19, 2006, the Court issued an order
24 denying Defendant's motion to dismiss without prejudice and granting the motion for a more
25 definite statement, setting a deadline of January 18, 2007 for any amendment. The Court
26 thereafter extended the deadline at Plaintiff's request and on July 20, 2007 Plaintiff filed the
27 operative Second Amended Complaint After Consolidation ("SACC").

28 The SACC contains the following claims: (1) age discrimination; (2) disability

discrimination; (3) violations of the family medical leave act and California Government Code; (4) breach of employment contract; and (5) breach of covenant the covenant of good faith and fair dealing. On August 8, 2007, Defendant again filed a motion to dismiss or in the alternative for a more definite statement. On September 21, 2007, Plaintiff filed an opposition brief requesting further leave to amend. The Court heard oral argument on October 11, 2007.

II. LEGAL STANDARD

For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Leave to amend must be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995). When amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

"A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984). For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). The pleading of a *pro se* litigant is held to a less stringent standard than a pleading drafted by an attorney, and is to be afforded the benefit of any doubt. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 623 (9th Cir. 1988). Further, a *pro se* litigant must be given leave to amend unless it is absolutely clear that the deficiencies of the complaint cannot be cured by amendment. *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

III. DISCUSSION

1. First Claim

Plaintiff's first claim alleges age discrimination under the Age Discrimination in Employment Act and state law. Defendant argues that this claim should be dismissed because

1 Plaintiff has not exhausted her administrative remedies as required by 29 U.S. C. § 2617 and Cal
 2 Gov't Code § 12960, 12965(b). Defendant has provided the Court with documents indicating
 3 that the claims filed by Plaintiff with the EEOC related only to alleged disability discrimination
 4 and made no mention of age discrimination. Plaintiff did not respond to this argument in her
 5 opposition to the motion. However, at oral argument Plaintiff asserted that she did follow the
 6 appropriate administrative procedures. Because the Court will grant Plaintiff leave to amend her
 7 other claims, Plaintiff may address this issue in an amended pleading.

8 **2. Second Claim**

9 a. Prima Facie Case

10 Plaintiff's second claim alleges discrimination under the Americans with Disabilities Act
 11 ("ADA") and the FEHA. To establish a prima facie case under the ADA the plaintiff must show
 12 that she: (1) suffered from a disability; (2) was otherwise qualified to do her job; and (3) was
 13 subjected to adverse employment action because of her disability. 42 U.S.C. § 1112(a); *see also*
 14 *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1090 (9th Cir. 2002). The showing required
 15 under FEHA overlaps with, but requires less than, the ADA. Under the FEHA, "a plaintiff need
 16 only show that she (1) suffers from a disability and (2) is a qualified individual." *Roberts*, 2006
 17 WL 4704616 at *10. Defendant challenges two elements of Plaintiff's prima facie case,
 18 contending that the SACC does not allege adequately that Plaintiff is disabled or that she has
 19 been subjected to an adverse employment action. These issues are discussed in turn below.

20 b. Disability

21 Defendant argues that Plaintiff's claim that she was able to perform her job precludes a
 22 finding that she is disabled. Without citing any authority, Defendant asserts, "[i]f plaintiff was
 23 able and willing to perform her job, she was not disabled." Motion to Dismiss SACC at 10. This
 24 argument is not consistent with the definition of "disability" in either the ADA or FEHA.

25 Both the ADA and FEHA define disability as a physical or mental impairment that
 26 "limits a major life activity." 42 U.S.C. § 1202(2)(A); Cal. Gov't Code § 1292(k)(B)(ii). Under
 27 FEHA, "major life activities shall be broadly construed and includes physical, mental and social
 28 activities and working." Cal. Gov't Code § 1292(k)(B)(iii). The ADA provides a more specific

1 definition, explaining that “major life activities” include “walking, seeing, hearing, and
 2 performing manual tasks.” 45 CFR § 84.3(j)(2)(ii). Additionally, the Supreme Court has
 3 explained that the ADA requires a *substantial* (not a total) limitation upon one’s life activity:

4 To qualify as disabled, a claimant must further show that the limitation on the
 5 major life activity is substantial. . . . According to the EEOC regulations,
 6 substantially limited means unable to perform a major life activity that the average
 7 person in the general population can perform; or significantly restricted as to the
 8 condition, manner or duration under which an individual can perform a particular
 9 major life activity as compared to the condition manner, or duration under which
 10 the average person in the general population can perform that same major life
 11 activity.

12 *Toyota Motor Mfg., Ky., Inc. v. Williams*, 122 S.Ct. 681, 690 (2002).³ In sum, to establish
 13 disability Plaintiff must identify some life activity she is unable to perform. To proceed with her
 14 ADA claim, she must demonstrate further that she is either completely unable to perform or can
 15 do so in a significantly restricted manner when compared to the general population.

16 Defendant’s argument does not fit within this framework. Plaintiff’s admission that she
 17 was able to perform her job does not preclude her claim of disability if she can allege some other
 18 limitation on life activity. Plaintiff has alleged:

19 Plaintiff has had a back problems affecting the musculoskeletal system and
 20 making it difficult for her to perform the major life activities of standing, walking,
 21 or sitting for extended periods. These difficulties in turn limited her ability to
 22 perform the major life activity of working, using standard office furniture and
 23 equipment.

24 SACC at ¶ 13. Plaintiff has identified specific major life activities that she is unable to perform.
 25 Her allegations suggest that she is unable to reach the level of performance expected among
 26 members of the general population. The Court thus concludes that Plaintiff has satisfied her
 27 burden of pleading a disability under both the ADA and FEHA.

28 c. Adverse Employment Actions

29 ³ At least one California court has held that the FEHA does not require a “*substantial*”
 30 limitation. *Colmenares v. Braemar Country Club, Inc.*, 29 Cal 4th 1019 (Cal. 2003).
 31 Conversely, another California court has explained “we may look to the cases from the
 32 Americans with Disabilities Act when interpreting the FEHA.” *Hanson v. Lucky Stores, Inc.*, 74
 33 Cal. App. 4th 215, 224 n.7 (Cal. Ct. App. 2d Dist. 1999). At this juncture it is not necessary for
 34 the Court to reach this question.

1 Plaintiff has alleged the following adverse employment actions: (1) failure to provide
 2 adequate accommodations and failure to respond to requests for accommodations; (2) wrongful
 3 termination; and (3) wrongful request for a medical examination. The motion to dismiss argues
 4 that Plaintiff has not adequately pled the first of these alleged adverse actions.⁴

5 Under both the ADA and FEHA, an employer's accommodation of disabled employees
 6 involves two separate responsibilities. Both § 12112(b)(5)(a) of the ADA and Cal. Gov't Code §
 7 12940(m) create a duty to provide "reasonable accommodations . . . unless [the employer] can
 8 demonstrate that the accommodation would impose an undue hardship on the operation of the
 9 business of the [employer]." 42 U.S.C. 12112(b)(5)(a); *see also* Cal. Gov't Code § 12940(m).
 10 Additionally, under California law the employer must "engage in a timely, good faith, interactive
 11 process with the employee or applicant to determine effective reasonable accommodations, if
 12 any, *in response to a request* for reasonable accommodation . . ." Cal. Gov't Code § 12940(n)
 13 (emphasis added). Plaintiff states claims under all three of these provisions.

14 Plaintiff alleges the following violation of 42 U.S.C. 12112(b)(5)(a) and Cal. Gov't Code
 15 § 12940(m): "Plaintiff was able, within the thirty days allowed her, to find another position, but
 16 when she requested accommodation, Defendant refused repeatedly and did not show that
 17 accommodation for Plaintiff would impose an undue hardship on him" SACC at ¶ 114.
 18 Plaintiff's reference to a request suggests that this claim should be brought under Cal. Gov't
 19 Code § 12940(n); however, given the ambiguity of the SACC, this is not entirely clear. Because
 20 no context provided for the statement there is no way to tell what accommodation Plaintiff
 21 sought or when she sought it. Plaintiff's a claim does not provide Defendant with sufficient

22
 23 ⁴ It is not clear from Defendant's papers whether its accommodations argument was
 24 advanced in support of the position that the *entire* second claim should be dismissed. Because
 25 the three adverse actions alleged by Plaintiff violate separate provisions of state and federal law,
 26 two of the claims would survive dismissal of Plaintiff's accommodation claim. The Court
 27 recognizes that the organization of Plaintiff's SACC makes it difficult for Defendant to respond.
 28 Accordingly, Plaintiff should amend her SACC so that each of the three current claims
 constitutes a separate claim for relief. This organization is necessary to comport with Federal
 Rule of Civil Procedure Rule 8(e)(2). *See Moffett v. Commerce Trust Co.*, 75 F. Supp. 303, 304
 (reasoning that under Rule 8(e)(2) a complaint setting forth several claims should state each
 claim in a separate count).

1 notice as to the conduct she is alleging.⁵

2 Plaintiff next claims that “Defendant refused to engage in an interactive process with
3 Plaintiff to find an effective and reasonable accommodation for her disabilities.” *Id.* at ¶ 115.
4 Defendant has argued that this claim should be dismissed because Plaintiff has not identified any
5 specific accommodations that were requested and refused. Plaintiff responds that she is not
6 required to identify specific requests in her pleadings. Opposition at 10. The Court agrees with
7 Defendant that a boilerplate statement is insufficient; Plaintiff must allege specific facts to
8 support her argument that Defendant did not engage in the requisite interactive process.
9 Elsewhere in the SACC, Plaintiff alleges that she asked that she be able to telecommute to work
10 on a full time basis, but this request was denied (instead Plaintiff was permitted to telecommute
11 on a part-time basis). FACC at ¶ 66. Additionally, Plaintiff asserts for the first time in her
12 opposition papers that she requested a recliner along with other accommodations. Opposition at
13 10. Again, Plaintiff must allege specific facts to support her claim.

14 Defendant also argues that Plaintiff in fact was accommodated because she was permitted
15 to telecommute part-time and paid leave subsequently was made available. The Court cannot
16 analyze this argument until Plaintiff has provided clearer allegations regarding her requests. The
17 Ninth Circuit has explained:

18 [T]he duty to accommodate is a continuing duty that is not exhausted by one
19 effort. . . . [I]f a reasonable accommodation turns out to be ineffective and the
20 employee with a disability remains unable to perform an essential function, the
21 employer must consider whether there would be an alternative reasonable
22 accommodation that would not pose an undue hardship. Thus, the employer’s
obligation to engage in the interactive process extends beyond the first attempt at
accommodation and continues when the employee asks for a different
accommodation or where the employer is aware that the initial accommodation is
failing and further accommodation is needed.

23 *Humphrey v. Mem’l Hosp. Ass’n*, 239 F. 3d 1128, 1138 (9th Cir. 2001).

24 Under both the ADA and FEHA, “*in appropriate circumstances*, reasonable

25
26 ⁵ Parties also dispute the cut-off point for Defendant’s duty to Plaintiff. Defendant
27 argues that it did not owe a duty to Plaintiff after she was terminated. Plaintiff responds that after
28 she was terminated Defendant had a duty prohibiting it from making her ineligible for rehire.
The Court cannot address these arguments Plaintiff has amended her Complaint to more clearly
state the alleged behavior.

1 accommodation can include providing the employee accrued paid leave or additional unpaid
 2 leave for treatment.” *Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 226 (Cal. Ct. App.
 3 1999) (emphasis added). However, leave is sufficient only if other accommodations would be
 4 ineffective:

5 [T]he leave accommodation is qualified. As long as a reasonable accommodation
 6 available to the employer could have plausibly enabled a handicapped employee
 7 to adequately perform his job, an employer is liable for failing to attempt that
 8 accommodation. In sum, a finite leave of absence has been considered to be a
 9 reasonable accommodation under the ADA, provided it is likely that following the
 10 leave the employee would be able to perform his or her duties.

11 *Id.*

12 **3. Third Claim**

13 Plaintiff’s statement of her third claim is as follows:

14 Both the FMLA and the CFRA provide that an employer may not refuse the
 15 request of an employee to take leave if that employee meets the requirements of
 16 these laws. But Plaintiff did not request to take leave, although Defendant
 17 fraudulently attempted to make it appear that she had. These statutes nowhere
 18 allow the employer to require an employee to take leave in lieu of providing an
 19 accommodation which will enable the employee to continue work.

20 Opposition at 14. This is not a proper claim. Plaintiff has not alleged a violation of the
 21 provisions grounding her claim and thus, has not shown that she is entitled to relief as required
 22 under Rule 8(a)(2). Because Plaintiff was not denied a request for leave, she may not state a
 23 claim under these provisions.

24 **4. Fourth and Fifth Claims**

25 Finally, Plaintiff asserts claims for breach of her employment contract and breach of an
 26 implied covenant of good faith and fair dealing. Defendant contends that because the conduct
 27 alleged relates to disparate treatment during employment, it does not support either claim.
 28 However, Plaintiff has made additional allegations that may support her claims.

29 **a. Termination for Reasons Other Than Good Cause**

30 Under California Labor Code § 2922, “[a]n employment, having no specified term, may
 31 be terminated at the will of either party on notice to the other.” However, the case law developed
 32 under this statute has developed certain boundaries to its application; “while an at-will employee
 33 may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to

1 terminate for an unlawful reason or a purpose that contravenes fundamental public policy.”

2 *Gantt v. Sentry Ins.*, 1 Cal.4th 1083, 1094 (Cal. 1992). Fundamental public policy is defined as
3 follows:

4 First, the policy must be supported by either constitutional or statutory provisions
5 or regulations enacted under statutory authority. Second, the policy must have
6 been articulated at the time of the discharge. Fourth, the policy must be
7 ‘fundamental’ and ‘substantial.’ . . . The cases in which California courts have
8 recognized a separate tort cause of action for wrongful termination in violation of
public policy generally fall into four categories, where the employee is discharged
for: (1) refusal to violate a statute; (2) performing a statutory obligation; (3)
exercising (or refusing to waive) a statutory or constitutional right or privilege; or
(4) reporting an alleged violation of a statute of public importance.

9 *Lagatree v. Luce, Forward, Hamilton & Scripps LLP*, 74 Cal. App. 4th 1105, 1111-12 (Cal. Ct.
10 App. 2d Dist. 2000); *see also Wells v. Bd. of Trs. Of Cal. State. Univ.*, 393 F. Supp. 2d 990, 997
11 (N.D. Cal. 2005). Although it she does not says so explicitly as part of her fourth claim, Plaintiff
12 has alleged that she was terminated because of her disability in violation of 42 U.S.C. §
13 12112(b)(5)(A) and Cal. Gov’t Code § 12940(a). SACC at ¶ 114. Such a termination would
14 constitute a violation of public policy. Accordingly, Plaintiff may amend her fourth claim to
15 incorporate the necessary allegations.

16 b. Good Faith and Fair Dealing

17 Under certain circumstances, California courts recognize that an employee is protected by
18 an implied covenant of good faith and fair dealing:

19 California law recognizes an implied covenant of good faith and fair dealing in
20 certain contracts that neither party will do anything to deprive the other of the
21 benefit of the contract. . . . California courts have recently applied the duty created
22 by the implied covenant to the situation where the employee alleges no more than
long service and the existence of personnel policies or oral representations
showing an implied promise by the employer not to act arbitrarily in dealing with
its employees.

23 *Cancellier v. Federated Dep’t Stores*, 672 F.2d 1312, 1318 (9th Cir. 1982). Specifically, “the
24 California courts [have] derived, from the implied- in-law covenant of good faith and fair
25 dealing, a requirement, under certain circumstances, that an at- will employee can only be
26 discharged for just cause.” *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076, 1077 (N.D.
27 Cal. 1982).

28 Plaintiff alleges that she “was discharged from her positions for reasons extraneous to the

1 employment agreement, without good or sufficient cause, in violation of Defendant's policy to
 2 deal consistently and fairly with its employees" SACC at 146. Additionally, Plaintiff's
 3 *fourth* claim asserts the following:

4 During the entire course of Plaintiff's implied-in-fact employment contract
 5 between Plaintiff and Defendants, there existed an implied-in-fact employment
 6 contract between Plaintiff and Defendants that . . . Plaintiff would not be demoted,
 7 discharged or otherwise disciplined, nor would Plaintiff's job functions be
 reassigned for other than good cause with notice thereof. This employment
 contract was evinced by various written documents, commendations, oral
 representations to Plaintiff by Defendants' (sic) agents and employees

8 SACC at 136. Plaintiff alleges that during her four years of employment, Defendant's personnel
 9 policies and oral representations led her to believe that her employment status would only change
 10 for good cause. If proved this allegation would support a finding that an implied covenant of
 11 good faith existed. Accordingly, Plaintiff may incorporate the necessary allegation in her fifth
 12 claim.

13 IV. ORDER

14 As the discussion on pages 1-4 of this order suggests, the Court has been exceedingly
 15 patient with Plaintiff's attempts to plead her case, in large part because Plaintiff is proceeding
 16 without counsel. However, there must be a limit to the number and scope of amendments
 17 permitted. Each time leave to amend is granted, Defendant incurs additional costs of defense,
 18 and the delay resulting from the necessity of motion hearings works to the detriment of both
 19 parties. Accordingly, while leave to amend at this time will be granted, further requests for leave
 20 will not be considered absent newly-discovered evidence. Plaintiff should assume that her next
 21 amendment to her pleadings will be her last. Good cause therefor appearing, IT IS HEREBY
 22 ORDERED that the motion to dismiss is GRANTED as set forth above. Any amended
 23 complaint should be filed within thirty (30) days of the date of this order.

24
 25 DATED: November 20, 2007.

26
 27
 28 
 JEREMY FOGEL
 United States District Judge

1 This Order has been served upon the following persons:

2 Patrick C. Doolittle patrickdoolittle@quinnemanuel.com

3 Scott G. Lawson scottlawson@quinnemanuel.com,
4 robertchang@quinnemanuel.com

5 Notice will be delivered by other means to:

6 Mary Helen Woodson
7 475 Milan Drive, #102
8 San Jose, CA 95134
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28